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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 795

CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, *Petitioner,*

v.

THEODORE I. COE, JOHN NOLEN, JR., ROBERT O. CLOUSER, JAMES E. SCHWAB, SAMUEL SCRIVENER, JR., as the Board of Zoning Adjustment, District of Columbia;

GILES EVANS, as Director of Licenses and Inspections; SAMUEL M. SELDEN, FRANK ALBERTOLI, ROBERT R. RODENBURG, and

THE WASHINGTON TERMINAL COMPANY and the REAL ESTATE AND IMPROVEMENT COMPANY OF BALTIMORE CITY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, *Petitioner,*

v.

SAMUEL M. SELDEN, et al, THEODORE I. COE, et al, and THE WASHINGTON TERMINAL CO., INC., et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Capitol Hill Southeast Citizens Association prays that a writ of certiorari issue to review the two-to-one decision of the United States Court of Appeals for the District of Columbia Circuit, of December 23, 1954, reversing a judgment of the United States District Court for the District of Columbia. The judgment of the District Court vacated an order of the Board of Zoning Adjustment for the District of Columbia which granted a special exception to the Zoning Regulations of the District of Columbia and authorized the establishment of a commercial auto-

mobile parking lot in an area zoned residential and used solely for residential purposes.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Memorandum Opinion, R. 155-158) has not been reported.

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (Appendix B to this petition, pages 8a-9a). Petition for rehearing was timely filed under the rules of Court and was denied on January 17, 1955. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The questions presented are as follows:

I

Was the offer of something of great value in money's worth, namely 50 free parking spaces, 24-hour service and uniformed attendants, made to the Sergeant-at-Arms of the House of Representatives to be distributed among individual members of Congress, conditioned upon the granting of a parking lot exception to the zoning regulations, a bribe or otherwise against public policy?

II

Was the attempt to influence the action of a Committee of the House of Representatives and individual members thereof by means of an offer of something of great value in money's worth a bribe or otherwise against public policy?

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III

Did the offer of something of great value in money's worth made to the Sergeant-at-Arms of the House of Representatives, to be distributed among individual Congressmen, violate Section 201 and/or Section 204 of Title 18, U.S. Code, relating to bribery and graft?

IV

Did the Board of Zoning Adjustment deny the petitioner a full, fair and impartial hearing due to the fact that the Board was under the erroneous impression, created by the offer of something of great value to the Sergeant-at-Arms of the House of Representatives conditioned upon the granting of the special exception and by the appearance of the Sergeant-at-Arms before the Board, that Congress wanted this parking lot as an "integral part" of the operation of Government?

V

Should the Courts lend judicial sanction to a transaction involving serious questions of both public policy and "noxious precedent" and condone the attempt to influence members of the Congress of the United States by means of an offer of something of great value?

VI

Does the word "temporary" as used in the Zoning Regulations of the District of Columbia (pertinent provisions appended hereto, page 11a), permitting, under certain conditions, property zoned residential to be used for commercial purposes, relate to the use of the property and impose a time limitation on such use, or, as the majority Court below held, does it apply to the parking of motor vehicles, as distinguished from the storage of motor vehicles?

VII

Are the roof and sides of a subsurface structure, to wit, a tunnel, which is in constant use twenty-four hours a day, "unimproved" property within the meaning of the Zoning Relations of the District of Columbia?

VIII

Is the action of an administrative body, the Board of Zoning Adjustment in this case, a creature existing solely by statute, governed and bound by statutory standards, in rendering an order in direct and obvious conflict with the statute, void and without authority in law?

IX

Is the granting of an exception permitting the parking of 136 automobiles on the roof of a subsurface tunnel with full knowledge of the fact that the tunnel might "cave in," action "designed to secure safety from fire, panic and other dangers," which is one of the expressed purposes of the comprehensive zoning plan for the District of Columbia?

STATUTES AND REGULATIONS INVOLVED

Title 18, U.S. Code, Chapter 11, Sections 201 and 204; Sections 5-413, 5-414, and 5-420, D. C. Code (1951); Section XXIII, Part 2, of the Zoning Regulations of the District of Columbia; 32 Statute at Large 773, Feb. 28, 1903. The statutes involved are printed as Appendix C to this petition.

STATEMENT OF THE CASE

This is a case involving action by the Board of Zoning Adjustment of the District of Columbia in granting a special exception to the Zoning Regulations of the District of Columbia permitting a commercial parking lot on a piece of property zoned residential and wholly in a residential

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district in the District of Columbia. The United States District Court for the District of Columbia, having jurisdiction under Section 11-306, D. C. Code (1951), vacated the order of the Board. The proponents of the parking lot, the respondents herein, appealed to the United States Court of Appeals for the District of Columbia Circuit, having jurisdiction under Title 28, U.S. Code, Section 1291, which Court in a two-to-one decision reversed the District Court.

The property involved in the controversy, to wit, Lots 800, 801, 809, 811, 812, 814, 818, Square 692 (R. 63, 81, 141), is an irregular piece of ground running catacorner across the block starting on C Street, S. E., opposite the House Office Building and ending on D Street and New Jersey Avenue, between C and D Streets, S. E. The entire block in which this property is located is zoned residential. The property to the north of the lots in question is the House Office Building.

The property in question was purchased in 1905 or 1906 (R. 4, 8, 25) by the Washington Terminal Company and the Real Estate and Improvement Company of Baltimore City, subsidiaries of the Baltimore and Ohio Railroad pursuant to authority given by Congress (R. 25-30), for the purpose of putting improvements thereon consisting of railroad tracks, masonry walls and a masonry and dirt roof that would provide an underground access to Union Terminal for trains to and from the South. A depressed structure, to wit, a tunnel or subway, with masonry sides and masonry and dirt roof, was constructed for this purpose and the property in question has, since the construction of the improvements, served as the roof of said tunnel or subway (R. 2-3, 24, 104). The proposed parking lot is the roof and sides of this tunnel. It is contemplated that cars would be parked on the roof of this tunnel. Such a procedure would be unsafe and the Board knew it. At the hearing of this case Mr. Schwab, a member of the Board of Zoning Adjustment and one of the respondents herein, admitted, "They might have to remodel the tunnel. The tunnel might cave in" (R. 116).

During the month of April 1953 there was an inquiry by the House of Representatives of the United States into the parking situation on the "Hill." A subcommittee of the Committee of House Administration was appointed to make a survey of the problem (R. 42, 81). After doing so, the subcommittee reported that it had thoroughly canvassed the situation and found a situation that was harassing but not overwhelming (R. 157). W. F. Russell, Sergeant-at-Arms of the House of Representatives was authorized to negotiate with the Baltimore and Ohio Railroad (R. 41-43, 81, 91), the beneficial owners of the property in question (R. 13, 39, 43, 81, 91, 98, 139), in regard to a lease of said property. An offer to lease the property was obtained from the Baltimore and Ohio Railroad for one dollar ($1.00) a year, but the Committee upon investigation refused to have anything to do with the proposition and "shied away" from it (R. 43, 82).

While the matter was still before the subcommittee, a Mr. Harless, on behalf of a syndicate of which he was originally a member, proposed to Mr. Russell, the then Sergeant-at-Arms of the House of Representatives, that if the subcommittee would relinquish any right in the unexecuted lease, it (the syndicate), if granted the right by the Board of Zoning Adjustment to operate a parking lot on the property, would provide fifty (50) free parking spaces to members of Congress (R. 41, 43, 44, 82).

Under date of April 28, 1953, the parties to the syndicate, Messrs. Albertoli, Selden, and Harless, wrote to the then Sergeant-at-Arms of the House, the letter reading in part as follows:

> "We, the undersigned, propose to apply to the owners of said property for a lease, and in the event such a lease is granted by the owners to these proponents, and the Zoning Commission of the District of Columbia permits the use of the property for parking, *we shall grant to the Sergeant-at-Arms of the United States House of Representatives permission to park 50 automobiles without charge on facilities to be pro-*

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vided. Should the owners of said property grant a lease to these proponents, we would propose that a clause be written into these (sic) lease which would guarantee this right to the United States House of Representatives." (Italics supplied). (Hearings before the Sub-committee of the Committee on Appropriations, House of Representatives, 83rd Congress, page 72).

Subsequent to the filing of the appeals with the Board of Zoning adjustment but prior to the hearings, the attorney for the syndicate wrote to the then Sergeant-at-Arms of the House, the letter reading in part as follows:

"It is our understanding that sufficient space for the parking of 50 automobiles will be reserved for the House of Representatives. Should the Board of Zoning Adjustment grant the permit for the parking lot we are hopeful to have the space available for the House of Representatives on or about July 1 next.

"If you or one of your assistants could be present at the hearing before the Board of Zoning Adjustment on June 10 to testify to the need for parking facilities near the Capitol, it would be most helpful." (Italics supplied.) (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 83rd Congress, page 70).

Influenced by this offer of 50 free parking spaces for Congressmen, the subcommittee wholeheartedly agreed to let the syndicate proceed with the definite understanding that the right to the free spaces would be incorporated in the lease between the syndicate and the Baltimore and Ohio Railroad (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 83rd Congress, page 70; R. 82).

The method of obtaining a special exception to the Zoning Regulations in the District of Columbia is by filing an appeal with the Board of Zoning Adjustment.

In pursuance of the scheme or plan to influence the conduct and decision of a Congressional subcommittee, the

Washington Terminal Company and the Real Estate and Improvement Company of Baltimore City, subsidiaries of the Baltimore and Ohio Railroad, who held legal title to the property in question, filed Appeals Nos. 3596 and 3597 (R. 81) with the Board of Zoning Adjustment for the District of Columbia for a special exception to establish a temporary parking lot on this residentially zoned property.

Hearings on the above numbered appeals were held June 10, July 15, August 13 and September 23, 1953 (R. 81, 92, 127, 138). Petitioner herein was represented at the first three hearings. The fourth hearing was *ex parte;* petitioner herein received no notice of and was not represented at the hearing of September 23, 1953.

At the hearing of June 10, in addition to the witnesses appearing for the purpose of testifying in opposition, a petition signed by over 95 per cent of the adjacent property owners in the area (120 in number) was submitted to the Board (R. 9, 84), along with twenty (20) letters of protest signed by adjacent property owners (R. 9).

As opposed to this, there were letters from nine Congressmen favoring the proposed lot (R. 10). Some of those Congressmen were motivated by the fact that the offer of fifty (50) free parking spaces had been made (Letter of H. A. Patten, M. C.):

> "I understand if this permit is granted the Sergeant-at-Arms has entered into a contract to furnish 50 additional spaces to be used by members of Congress. Therefore may I request that the Board take favorable action on this matter."

Not one resident of the area wrote in or appeared in favor of the parking lot.

At the hearing of June 10, the Board heard testimony of several of the adjacent property owners who testified, albeit under heckling by the Board, to the energetic restoration being undertaken in that area in an effort to turn it into one of the finest residential areas in the District; to

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the tremendous increase in property values in the area since the start of its restoration; and to the adverse effect a parking lot would have upon the property in the area (R. 85-90).

Appearing on behalf of the proponents of the proposed lot at the June 10th hearing were William Russell, then Sergeant-at-Arms of the House, who appeared at the request of the syndicate, and Richard Harless, a former member of the syndicate appearing in favor of the special exception, and one who would monetarily benefit from the operation of the proposed lot (R. 103), and who stated generally that there was a need for parking on the "Hill." Neither of these men lived on the Hill, nor were these men heckled by the Board.

On July 15, the Board heard the testimony of other property owners opposing the proposed lot, testimony to the effect that approximately $1,000,000.00 was expended for the purpose of restoring houses within a radius of two blocks of the site of the proposed lot (R. 105), testimony that no need for additional parking facilities exists in the neighborhood, and testimony that if such a lot were established, the efforts to restore that area in the shadow of the Capitol into a beautiful residential section would be seriously impeded.

At this hearing Captain Broderick of the Capitol Police, appearing at the behest of the proponents of the proposed lot, testified that the parking problem was critical "as in most parts of the city" (R. 96). Captain Broderick further stated that each Congressman had a space to park his car and that several hundred additional spaces were maintained for the "working force" (R. 97).

On August 13, the Board heard a motion for re-hearing by the opponents of the proposed lot. The grounds for the motion were that certain testimony by Captain Broderick and Mr. Harless was heresay and would prove to be untrue. The motion was denied.

The hearing of September 23 was *ex parte*. At this hearing the opponents were not represented. At this *ex parte* hearing the proponents changed their position on material matters. Throughout the hearings the proponents were not in accord and contradicted themselves as to the number of automobiles the proposed parking lot would hold; the number ran anywhere from 70 (Mr. Russell, R. 91) to 175 (Mr. Harless, R. 99). However, at this hearing the number was definitely set at 136 by Mr. Wilkes (R. 139), an attorney who was "representing the proponents in cases #3596 and #3597" (R. 92). Wilkes had previously stated the lot would hold 170 cars (R. 125).

Mr. Wilkes further testified at the hearing of September 23, 1953, that the land in question was owned by "the B&O Railroad Co. and the Washington Terminal Co." (R. 139), and reiterated and repeated the offer of 50 free parking spaces with 24-hour a day service. He stated:

> "There would be 24-hour service furnished parkers." (R. 139),

and further, that:

> "A number of spaces are to be available without charge to members of Congress" (R. 139).

When asked how many, he replied "50" (R. 140).

The members of the Board at the *ex parte* hearing expressed doubt as to the legality of the transaction, but Mr. Wilkes, counsel for proponents of the lot, refused to answer the inquiry as to legality and stated that such a problem was not within the Board's authority (R. 140).

On October 1, 1953, the Board, after a three-to-two decision, entered an order granting a special exception to use this residentially zoned property in a residential district as a temporary automobile parking lot for a period of two years (R. 76-80).

Petitioner herein filed a complaint for injunctive relief in the United States District Court for the District of

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Columbia. The Court below on December 18, 1953, entered judgment issuing the injunction, vacating the Board's order, and referred the case back to the Board with instructions to vacate the order. The respondents herein appealed to the Court of Appeals, which, in a two-to-one decision, reversed the action of the District Court.

REASONS FOR GRANTING THE WRIT

I & II

The petitioner respectfully submits that this Court should grant the writ in order that this Court might consider and determine, among other things, an issue of great national importance involving as it does an attempt to corrupt and jeopardize the integrity of the public administration.

The questions raised by the transactions involved herein, whether private parties can with impunity offer something of great value—approximately $40,000.00 in money's worth —to the Sergeant-at-Arms of the House of Representatives to be distributed among individual members of Congress, with the intent to influence action of a committee of the House, and of individual members thereof and of the Sergeant-at-Arms, are so serious that they should be considered by this Court forthwith.

As set out more fully in the statement of facts, a subcommittee of the House of Representatives properly had before it for its consideration the parking situation on Capitol Hill. It was considering, among other properties, the property involved in this controversy. While the issue was before the subcommittee a syndicate, composed of the respondents, Selden, et al, approached the Sergeant-at-Arms of the House, who was acting on the parking problem under authority of the subcommittee, and proposed that if the subcommittee would drop its consideration of the property in question, it, the syndicate, would give fifty (50) free parking spaces to Congress provided the Board of Zoning Adjustment granted the special exception (R.

82), and further requested that the Sergeant-at-Arms appear and testify in favor of the parking lot.

Obviously the proponents of the parking lot had something to gain by virtue of the offer of fifty (50) free parking spaces out of a total of 136—over ⅓ of their source of revenue—to the Sergeant-at-Arms for the benefit of fifty (50) individual Congressmen. Obviously the syndicate hoped to influence the action of the Sergeant-at-Arms and the subcommittee, and further to gain support for their private venture and thus deceive and mislead the Board of Zoning Adjustment into finding this parking lot to be an "integral part" of the operation of Government.

Influenced by this offer of free parking space the subcommittee agreed to drop its consideration and let the syndicate proceed. Not only was the subcommittee influenced by this offer but the Sergeant-at-Arms appeared before the Board of Zoning Adjustment and testified in favor of the parking lot, and in addition certain individual Congressmen even wrote to the Board of Zoning Adjustment asking that favorable action on the parking lot appeal be taken by the Board.

Your petitioner respectfully submits that this offer of free parking spaces was the equivalent of a bribe or otherwise against public policy; the fact that the offer was made openly and notoriously only aggravates the offense; and petitioner further submits that the writ should be granted in order that the Court might consider this important question.

III

Congress has enacted many statutes designed to safeguard the integrity of the public administration and has enacted statutes concerning many actions which would result in corruption in government. *U. S.* v. *Reisley,* DCNJ 1940, 35 Fed. Supp. 102.

Your petitioner respectfully submits that Title 18, U.S. Code, Sections 201 and 204 (Appendix C, pages 11a-12a) are

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involved in this proceeding. Section 201 makes it a penal offense to offer anything of value to an officer or other person acting for or on behalf of either House of Congress, or of any Committee thereof with the intent to influence his decision or action on any matter; Section 204 makes it a penal offense to offer anything of value to any member of either House of Congress with the intent to influence action on any matter which is or may be before Congress or a committee thereof.

The Court in *Kemler* v. *United States,* CCA Mass., 1943, 133 F. 2d 235, in considering Sec. 91, now Sec. 201, of Title 18, U.S. Code, said:

> "The clear purpose of the statute is to protect the public from the evil consequences of corruption in public service. Thus the gravamen of the offense described therein is the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct. *Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent* it can make no difference if after the act is done the doer discovers that for some reason or another, be it a mistake on his part or the mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it. *The statute is violated when a bribe is given or an offer is made regardless of the occasion therefore,* provided it is done with the requisite intent and provided the acceptor or the offeree of the bribe is a person of the sort described in the statute." (Italics supplied).

The Court in *Blunden* v. *United States,* CCA Ohio, 1948, 169 F. 2d 991, in considering the same statute said:

> "In *Rembrandt* v. *U. S.,* 6 Cir., 281 F. 2d 122, this Court held that the statute refers not merely to influencing a decision on any question, but also to influencing action on any matter, and that the statute was applicable to a situation where the advice and recom-

mendation of the Government employee involved would be influenced in securing the decision desired by the persons offering the bribe, even though the employee did not have the authority to make the final ruling."

Petitioner will not restate what was said hereinbefore concerning the transactions involved other than to state that an offer was made, and that the Sergeant-at-Arms, a subcommittee of the House of Representatives, and certain individual members thereof were influenced thereby; and, finally, that the Board of Zoning Adjustment was influenced thereby.

IV

Your petitioner respectfully submits that the offer of fifty (50) free parking spaces was made not only for the purpose of influencing the action of the Sergeant-at-Arms and of the Congressional Subcommittee on the matter properly before it but also for the purpose of gaining a certain amount of Congressional support for their (the syndicate's) private venture, and thus to deceive the Board of Zoning Adjustment into finding that the parking lot was needed as an "integral part" of the operation of Government.

In addition to the letters written to the Board by members of Congress, *two of the three witnesses appearing in favor of the parking lot before the Board were government employees!*

William Russell, who was the Sergeant-at-Arms of the House of Representatives, appeared to testify in favor of the parking lot at the express request of the syndicate (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 83rd Congress, page 70).

Captain William J. Broderick of the U. S. Capitol Police appeared to testify in favor of the parking lot.

The District Court pointed out, that, influenced by these two important Governmen employees:

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> "The Board starts out on a false premise. It proceeded on what it apparently regarded as the desire, if not the *fiat* of the Congress for a change." (R. 156).

That the Board was influenced and did so proceed is clear from the wording of its order:

> "The Board must take judicial notice of the fact that the operation of Government is a vast enterprise and requires as an integral part of such operation all of the ancillary parking facilities which would normally be present as a part of any large office arrangement." (R. 79).

Starting out on the false premise that Congress demanded the parking lot, the Board took the view that the residents of the area were trying to interfere with the operations of Government and rudely abused, heckled and upbraided the residents of the area for opposing the lot (R. 89, 122-123).

Your petitioner respectfully submits that the offer of fifty (50) free parking spaces so influenced the Sergeant-at-Arms and certain members of Congress, which in turn created a false atmosphere of Congressional desire, that the Board of Zoning Adjustment was deceived and denied a full, fair and impartial hearing to the petitioner.

V

It is respectfully urged that a party cannot approach a bar of justice seeking judicial support for an immoral or illegal act.

The offer of fifty (50) free parking spaces, uniformed attendants and 24-hour service made to the Congress of the United States in a successful attempt to influence action on certain matters raises the question of immoral and illegal conduct.

Your petitioner respectfully submits that strong public policy as well as express statute should act to prevent these dealings between private parties and the Congress of the United States, the Sergeant-at-Arms of the House

of Representatives, or the Board of Zoning Adjustment, and that this Court should grant the writ to determine whether the transaction falls wihin Section 201 and/or 204 of Title 18, U. S. Code, and if so, whether judicial sanction should be lent thereto.

VI

Aside from the serious questions of bribery, public policy and noxious precedent herein involved, there are other equally compelling reasons why the writ should be granted.

The zoning regulations, Section XXIII, Part 2, provide that the Board of Zoning Adjustment may under certain prescribed conditions, permit "the use of an unimproved lot for the *temporary* parking of motor vehicles." (Italics supplied.)

The zoning regulation governing this case is ambiguous, and has never heretofore been judicially interpreted. Due to the inherent ambiguity and lack of precedent the Court below was divided as to the proper construction to be placed on the regulation.

Since the construction of the Court below will establish a precedent for similar action in the future, it is respectfully suggested that it is imperative that the regulation be construed in keeping with the purpose and intent of the comprehensive zoning plan for the District of Columbia.

Throughout the history of this dispute, the parties hereto have consistently construed and interpreted the word "temporary" as used in the regulations as imposing a time limitation on the use of residential property as a parking lot; this was voluntarily admitted by the Corporation Counsel during oral argument in the Court below.

Furthermore the appeals that were filed with the Board of Zoning Adjustment and the order of the Board acting thereon both referred to a temporary parking lot—not a lot for temporary parking.

Despite the admission by Corporation Counsel, the order of the Board, and other numerous record references con-

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struing the word "temporary" as imposing a time limitation on the use of the property, the Court below in its majority opinion stated:

> "It is the parking of the motor vehicles, not the use of the lot that the regulation requires to be temporary."

Judge Prettyman in his dissenting opinion, however, arrived at the opposite conclusion and interpreted the regulation to impose a limitation on the use of the property.

Numerous cases have considered the word "temporary" as used in zoning ordinances and regulations and have interpreted the word as imposing a time limitation upon the use of the property. *People ex rel. St. Albans—Springfield Corp.* v. *Connell,* 257 N.Y. 73, 177 N.E. 313; *People ex rel Saypol* v. *Griffin,* 182 Misc. 454, 44 NYS 2d 68; *Burke* v. *Cohen,* 13 NYS 2d 984; *Morris* v. *Zoning Board of Review,* 52 R.I. 26, 155 A 654.

In order to protect and insure the development of neighborhoods as they are zoned, all special exceptions should be, and are, limited to a temporary existence subject to renewal in certain cases.

Because of the lack of precedent and the divided opinion of the Court below, your petitioner respectfully submits that this Court should grant the writ in order that the Court might consider and interpret the zoning regulation involved in keeping with the intent of the plan designed for the District of Columbia.

VII

The zoning statute and regulations provide that under certain conditions, and those conditions only, the Board of Zoning Adjustment has the power to grant "special exceptions" (D. C. Code, Section 5-420 (1951); Section XXIII, Part 2 of the regulations).

The zoning regulations of the District of Columbia provide that where certain stated conditions exist, the Board of Zoning Adjustment may grant a "special exception"

and permit a parking lot on property zoned residential. One of those stated conditions is that the property must be *unimproved* (Section XXIII, Part 2, App. C, page 11a).

If the property is improved, the Board has no authority to grant the special exception.

The property in this case is improved. Although the majority of the Court did not consider this important point, Judge Prettyman, in his dissenting opinion, in the Court below said:

> "I note in passing the strip of land here involved was not technically an unimproved lot. Under its top surface it was wholly improved by a tunnel built and constantly used by the railroads. * * * "

The property was purchased in 1905 or 1906 pursuant to acts of Congress (32 Statute at Large 773) for the sole purpose of putting improvements thereon consisting of railroad tracks, masonry walls and a masonry and dirt roof which would provide an underground access to Union Terminal for trains to and from the South. The land was prepared and a depressed structure, to wit, a tunnel or subway was constructed for this purpose and the property has, since the construction of the improvements, served as the roof of the tunnel.

The Court in the case of *Sterling-Nash Corp.* v. *Combes,* 122 NYS 2d 413, in considering the meaning of the word "unimproved," when used in a zoning ordinance said:

> "Zoning ordinance relating to the use of 'unimproved' lots for used car lot was intended by use of the quoted word to distinguish a vacant lot from a lot with a building or *structure* thereon * * *." (Italics supplied.)

That a tunnel is a structure cannot seriously be disputed. The Act of Congress of 1903 (32 Statute at Large 773) authorizing the construction of the tunnel called the tunnel a structure and an improvement (Appendix C, pages 12a and 13a).

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The Court in *Bluefield Supply Co.* v. *M. P. Smith Const. Co.*, 115 W. Va. 637, 177 SE 296, said:

> "We cannot agree with the contention of the defendant below to the effect that a railway tunnel is not a structure within the meaning of the mechanics lien statute.
>
> "We see litle, if any, difference in principle between preparing the ground beneath the tracks of a railway so that trains may run on it and preparing the space above a railway so that trains may run *through* it."

Your petitioner respectfully submits that since the property was improved, the Board had no authority to grant the special exception. Lacking such authority, its action was void and without authority in law or otherwise.

VIII

As hereinbefore stated administrative boards are bound and governed by the statutory standards imposed for their guidance.

Not only did the Board of Zoning Adjustment clearly violate the authority delegated to the Board by permitting the parking lot on improved property but further abused and exceeded its authority when *the Board in its order granting the exception expressly required that the property be further improved.*

> "This order shall be subject to compliance with these conditions:
>
> "(a) The lot shall be appropriately surfaced with blacktop or concrete and lighted for night use as per plan on file with the Board.
>
> "(b) Planting and screening arrangement, driveways and spacing shall also be provided and maintained as per plan submitted." (R. 79-80).

The regulations governing the Board of Zoning Adjustment expressly provides that a special exception permitting a parking lot in a residential area may be granted only when,

among other things the property is unimproved; nevertheless, and clearly contrary to the regulations, *the Board ordered the parking lot only on the express condition that the lot be improved for that use.*

This order was clearly in violation of the regulations and therefore without authority in law or otherwise.

Any action taken by a Board of Zoning Adjustment not within the terms of the regulations, or statute, creating it and prescribing its duties is void. *Applestein et ux* v. *Osborne,* 143 A. 666, 156 Md. 40; *In Re Cobb,* 217 NYS 593.

The petitioner respectfully submits that the writ should be granted so that this Court might determine the extent of the Board's powers under the regulations involved, and whether petitioner has been deprived of its rights without due process of law.

IX

The zoning plan created and in force in the District of Columbia was designed, among other things, "to secure safety from fire, panic and other dangers" (Appendix C, page 10a). Such is the purpose and intent of the regulations; special exceptions if granted must be in harmony with such purpose and intent.

As aforementioned the proposed parking lot contemplates placing 136 automobiles plus property improvements on the roof of well traveled railroad tracks housed by a subsurface tunnel.

The Board of Zoning Adjustment granted the special exception without receiving or asking for evidence pertaining to the safety aspect of such a venture.

Notwithstanding the absence of evidence relating to the safety factor, and with full knowledge that the weight of the automobiles could cause a "cave in" the Board granted the special exception!

The Board was fully aware of the dangers inherent in such a project as manifested by the remark of Mr. Schwab, a Board member:

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"They might have to remodel the tunnel. The tunnel might cave in." (R. 116).

The Board's action, considered in the light of its knowledge of the danger involved, was a gross abuse of discretion, and a serious violation of the regulations, and as such constituted illegal, unauthorized action.

CONCLUSION

For the reasons hereinbefore set forth, and in order that this Court might consider and determine whether the action of the Board of Zoning Adjustment was void, whether such action was against public policy, whether the Courts should condone an immoral and illegal transaction, and so that this Court might place the proper interpretation on the zoning regulations of the District of Columbia for the guidance of the Courts and litigants in future actions, the petitioner respectfully prays that the writ be granted.

Respectfully submitted,

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Washington 3, D. C.,
Attorney for Petitioner.

APPENDIX

APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12088

SAMUEL M. SELDEN, ET AL., *Appellants,*
v.
CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, ET AL., *Appellees.*

No. 12089

THEODORE I. COE, ET AL., *Appellants,*
v.
CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, *et al., Appellees.*

No. 12091

THE WASHINGTON TERMINAL CO., INC., THE REAL ESTATE AND IMPROVEMENT COMPANY OF BALTIMORE, *Appellants,*
v.
CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, ET AL., *Appellees.*

Appeals from the United States District Court for the District of Columbia

Decided December 23, 1954

Before EDGERTON, PRETTYMAN, and WASHINGTON, Circuit Judges.

EDGERTON, *Circuit Judge:* These appeals are from a judgment setting aside an order of the Board of Zoning Adjustment of the District of Columbia. The Board's order authorized, for a two-year period, an automobile parking

lot at New Jersey Ave. and D St. Southeast. The neighborhood is residential and the Board's order created an exception to zoning regulations.

The Zoning Law provides that "The regulations adopted by the Zoning Commission may provide that the Board of Adjustment may, in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent. . . ." D.C. Code (1951) § 5-420, 52 Stat. 799. The regulations empower the Board, among other things, to "permit, in a residential district, . . . the use of an unimproved lot for the temporary parking of motor vehicles, subject to such restrictions and safeguards as may, in the opinion of the Board, be necessary to protect the residential property in the vicinity, when such use is found to be reasonable necessary or convenient to the neighborhood, and not to interfere unreasonably with the most appropriate use of neighboring property under the zone plan. . . ."

The Board of Zoning Adjustment held extensive hearings. There was ample evidence of need for additional parking facilities in the neighborhood. The Board found unanimously that "a critical parking problem is now existing on the south side of Capitol Hill." On the other hand, there was ample evidence that the parking lot would make adjoining property less desirable for residence purposes. But a majority of the Board found that "subject to compliance with restrictions and safeguards to be made conditions of this order the use will not interfere unreasonably with the use of neighboring property under the zone plan. That it will operate as a convenience to the neighborhood as such is best indicated by the probable increase in available curb parking by reason of the additional off-street spaces provided. The granting of this appeal we believe to be in the public interest." The Board attached these conditions to its order: "(a) The lot shall be appropriately surfaced

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with blacktop or concrete and lighted for night use as per plan on file with the Board. (b) Planting and screening arrangement, driveways and spacing shall also be provided and maintained as per plan submitted. (c) Permit shall issue for a trial period of two years only, but shall be subject to renewal in the discretion of the Board upon a new appeal filed in the manner prescribed by law."

The District Court concluded the Board's findings were not supported by substantial evidence. The court therefore directed the Board to vacate its order. We think the court erred.

A parking lot is neither a junk yard for motor vehicles nor a place for putting them in storage. It is a "lot for the temporary parking of motor vehicles." It is the parking of the motor vehicles, not the use of the lot, that the regulation requires to be temporary. The parking problem is more critical in some neighborhoods that lack off-street parking facilities than in many downtown areas that already have them. Though the proposed facility will "interfere" with the use of neighboring property for residence purposes, the question whether it will interfere "unreasonably" can only be answered, like any other question of reasonableness, in the light of all the circumstances, and these include the "critical parking problem on the south side of Capitol Hill." There is, we think, ample room for difference of opinion on this question. The Board of Zoning Adjustment is created and qualified to decide such questions of opinion. Courts should not substitute their opinion for the Board's.

Reversed.

PRETTYMAN, *Circuit Judge*, dissenting: I would affirm the judgment of the District Court in this case.

The Board of Zoning Adjustment operates under regu-

lations prescribed by the Zoning Commission. The statute so provides.[1] It says:

> "The regulations adopted by the Zoning Commission may provide that the Board of Adjustment may, in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent." [2]

And the statute further provides:

> "The Board of Adjustment shall not have the power to amend any regulation or map." [3]

The regulations adopted by the Zoning Commission provide as follows:

> "Upon appeals the Board of Zoning Adjustment is hereby empowered to grant requests for the following special exceptions, when, in the judgment of the Board, such exceptions shall be in harmony with the general purpose and intent of the zoning regulations * * *:
>
> * * * * *
>
> "4. Permit, in a residential district, except as hereinafter provided, the use of an unimproved lot for the temporary parking of motor vehicles, subject to such restrictions and safeguards as may, in the opinion of the Board, be necessary to protect the residential property in the vicinity, when such use is found to be reasonably necessary or convenient to the neighborhood, and not to interfere unreasonably with the most appropriate use of neighboring property under the zone plan. * * *" [4]

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[1] 52 Stat. 797 (1938), as amended, D.C. Code § 5-413 (1951); 52 Stat. 799 (1938), D.C. Code § 5-420 (1951).

[2] 52 Stat. 799 (1938), D.C. Code § 5-420 (1951).

[3] *Ibid.*

[4] Sec. XXIII, Part 2, of the Zoning Regulations of the District of Columbia, effective Sept.1, 1953.

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The pertinent words to be extracted from this regulation are: "The Board is empowered to permit, in a residential district, the use of an unimproved lot for the temporary parking of motor vehicles, when such use is found not to interfere unreasonably with the most appropriate use of neighboring property under the zone plan."

The Board of Adjustment has no power in respect to parking lots in residential districts, except as the power is given it in the foregoing regulation, and its authority does not go beyond the permission given it by the regulation. Two features of this regulation are absolutely violated by the order of the Board before us.

In the first place the Board was authorized to permit "temporary parking of motor vehicles" only. It has no power to permit the building of a permanent parking lot. The two things are totally different, and the regulation meant what it said. It meant to authorize the Board to permit temporary parking, and no more. The word "temporary" is used at other places in the regulations (*e.g.*, Sec. XXIII, Part 2, pars. 5 and 6, and Sec. III, par. 13), and reference to those sections clearly shows that the word means temporary. In the order before us the Board purported to permit the construction and operation of a parking lot surfaced with blacktop or concrete and lighted for night use, with planting and driveways. To be sure, it granted the permit for two years only and so calls it a temporary parking lot, but the permit expressly says it is for "a trial period" and is subject to renewal (unrestricted as to term) at the discretion of the Board. A permanent operation is clearly contemplated. As I see it, there is not, and was not intended to be, any temporary feature about it.

The court says it is the parking of the motor vehicles that the regulation requires to be temporary. I had thought all parking of cars, in any ordinary sense of the term, is temporary. At the oral argument counsel for the District of Columbia voluntarily agreed that the regula-

tion has always been construed as referring to the temporary use of the premises.

In the second place the Board was not authorized by the regulation to grant a permit unless the proposed use is found "not to interfere unreasonably with the most appropriate use of neighboring property under the zone plan." This is a residential district. And so the most appropriate use of neighboring property under the zone plan is for residences. It is so used. One must visualize the physical layout of this property in order to grasp the full import of what has been done here. There is a piece of land (not exactly square) bounded by four streets. Along one whole side, including the two corners, is a row of residences. On another corner is a large hotel. The property with which we are concerned is a diagonal strip, across the interior of the square, back of the residences, and between them and the rear of the hotel. The edge of this strip is along the rear boundaries of the residence properties. Not one resident of the area wrote in or appeared in favor of the parking lot.

It seems to me that one could hardly imagine a use of an interior plot of land, inside a square of residential property, which would interfere more unreasonably with the use of the neighboring residences as residences, than would the operation of a paved parking lot for 134 cars, lighted at nighttime. It seems to me that a paved and lighted parking lot, occupied by 134 cars, would absolutely prevent any reasonable use whatever of these neighboring residences as residences. If that is so, the Board had no power under the regulations to grant the permit.

What I am saying might be cast in terms of support in the evidence, arbitrary action, and abuse of discretion. But the regulation is framed in terms of power, and I adhere to the plan of the regulation. If I phrased my view in the other language, I would say there is no evidence to support a finding that the proposed parking lot would not interfere unreasonably with the residential use of these

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neighboring residences and that the order granting the permit is arbitrary and an abuse of discretion.

My brethren place great reliance upon the findings by the Board that there is a critical parking problem on the south side of Capitol Hill. There is a critical parking problem in every spot in downtown Washington and in many spots outside the downtown area. But that is no reason for violation of zoning maps and regulations. It is no justification for permitting the invasion of every residential district by paved and lighted parking lots. Any such move would destroy the whole purpose of zoning, which is to protect each type of neighborhood in the use, and accompanying value, prescribed by the top zoning authorities, in this case the Zoning Commission, not the Board of Adjustment. Zoning is not designed for the benefit of intruders into neighborhoods; it is designed to protect the character of neighborhoods as such character either exists or develops.

I note in passing the strip of land here involved was not technically an unimproved lot. Under its top surface it was wholly improved by a tunnel built and constantly used by the railroads. But that is a minor factor here.

I think the District Court was correct in the view and the action which it took.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1954

No. 12,088

SAMUEL M. SELDEN, ET AL., *Appellants,*

v.

CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, a corporation, et al., *Appellees.*

October Term, 1954

No. 12,089

THEODORE I. COE, ET AL., as Board of Zoning Adjustment, *Appellants,*

v.

CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, a corporation, ET AL., *Appellees.*

October Term, 1954

No. 12,091

THE WASHINGTON TERMINAL COMPANY, THE REAL ESTATE AND IMPROVEMENT COMPANY OF BALTIMORE, corporations, *Appellants,*

v.

CAPITOL HILL SOUTHEAST CITIZENS ASSOCIATION, a corporation, ET AL., *Appellees.*

Appeals from the United States District Court for the District of Columbia

Before: EDGERTON, PRETTYMAN and WASHINGTON, *Circuit Judges.*

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JUDGMENT

These appeals came on to be heard on the original record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and the same is hereby, reversed, with costs, and that these cases be, and they are hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: December 23, 1954

Per Circuit Judge Edgerton.

Separate dissenting opinion by Circuit Judge Prettyman

APPENDIX C

Statutes and Regulations Involved

Section 5-413, District of Columbia Code (1951)

"To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission created by Section 5-412 is hereby empowered, in accordance with the conditions and procedures specified in Sections 5-413 to 5-428, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes; and for the purpose of such regulation said commission may divide the District of Columbia into districts or zones of such number, shape, and area as said Zoning Commission may determine, and within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance and uses of buildings and structures and the uses of land. * * * All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts." (June 20, 1938, 52

Stat. 797, ch. 534, Sec. 1; March 4, 1942, 56 Stat. 122, ch. 126).

Section 5-414, District of Columbia Code (1951)

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein." (June 20, 1938, 52 Stat. 797, ch. 534, Sec. 2).

Section 5-420, District of Columbia Code (1951)

"A board of zoning adjustment is hereby created * * *.

"The regulations adopted by the Zoning Commission may provide that the Board of Adjustment may, in appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent. The Commission may also authorize the Board of Adjustment to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the regulations.

"The Board of Adjustment shall not have the power to amend any regulation or map.

"* * *

*Upon appeals the Board of Adjustment shall have the following powers:

* * *

"(2) To hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission,

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requests for special exceptions or map interpretations or for decisions upon other special questions upon which such Board is required or authorized by the regulations to pass." (June 20, 1938, 52 Stat. 799, ch. 534, Sec. 8).

Zoning Regulations of the District of Columbia, Section XXIII, Part 2

"Powers Relative to Exceptions and Special Questions

"Upon appeals the Board of Zoning Adjustment is hereby empowered to grant requests for the following special exceptions, when, in the judgment of the Board, such exceptions shall be in harmony with the general purpose and intent of the zoning regulations and maps and will not tend to affect adversely the use of neighboring property in accordance with the zoning regulations and maps."

"* * *

"4. Permit, in a residential district, except as hereinafter provided, the use of an unimproved lot for the temporary parking of motor vehicles, subject to such restrictions and safeguards as may, in the opinion of the Board, be necessary to protect the residential property in the vicinity, when such use is found to be reasonably necessary or convenient to the neighborhood, and not to interfere unreasonably with the most appropriate use of neighboring property under the zone plan.* * *"

Title 18, United States Code, Section 201

"Offer to officer or other person—

"Whoever, promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the U. S., or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, *with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending*, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or

with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both." (Italics added).

Title 18, United States Code, Section 204:

"Offer to Member of Congress.

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any Member of either House of Congress, or Delegate to Congress, or Resident Commissioner, either before or after he has qualified, or to any person with his consent, connivance, or concurrence, with intent to influence his action, vote, or decision on any question, matter, cause, or proceeding which may at any time be pending in either House of Congress, or before any committee thereof, or which by law may be brought before him in his capacity as such Member, Delegate, or Resident Commissioner, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both." (June 25, 1948, ch. 645, Sec. 1, 61 Stat. 692, eff. Sept. 1, 1948).

32 Statute at Large 773:

"I. An Act to provide for a union railroad station in the District of Columbia, and for other purposes." Fifty-Seventh Congress, Session II, Chapter 856, Section 6, Approved February 28, 1903.

Taxation

"SEC. 6. That the property owned or occupied by the terminal company, or by the Philadelphia, Baltimore and Washington Railroad Company, or by the Baltimore and Ohio Railroad Company under authority of this Act, or otherwise, together with the improvements that may be put thereon, shall be subject to taxation in the District of

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Columbia in the same manner and to the same extent as other property in the District, and all tracks and sidings shall be taxed as real estate: *Provided*, That no assessment, valuation, or tax shall be made, laid or levied on the stations, terminals, and lines of railroad located, constructed, or maintained under the authority of this Act in excess of that which would or could be lawfully made, laid, or levied if said stations, terminals, and lines of railroad were located, constructed, and maintained without the use of bridges, tunnels, viaducts, retaining walls, or other structures necessary or properly employed to elevate or to depress the same as required by this Act; it being the true intent and meaning hereof that the lines of railroad and terminals hereby authorized shall be assessed and valued for the purpose of taxation and taxed on the same basis as if the same were not constructed and maintained by means of such bridges, tunnels, viaducts, retaining walls, and other structures: *Provided*, That such portions of the terminal structure or viaduct as may be constructed and used for storage or like commercial purpose shall be subject to taxation in the same manner as other property in the District of Columbia."